United States Court of Appeals
for the Ninth Circuit

HOLMAN ERECTION COMPANY, INC.,
Appellee,

vs.

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al.,
Appellants.

No. 18876

Appellee's Brief

Appeal from the United States District Court for the Eastern District of Washington, Southern Division
Honorable William J. Lindberg, Judge

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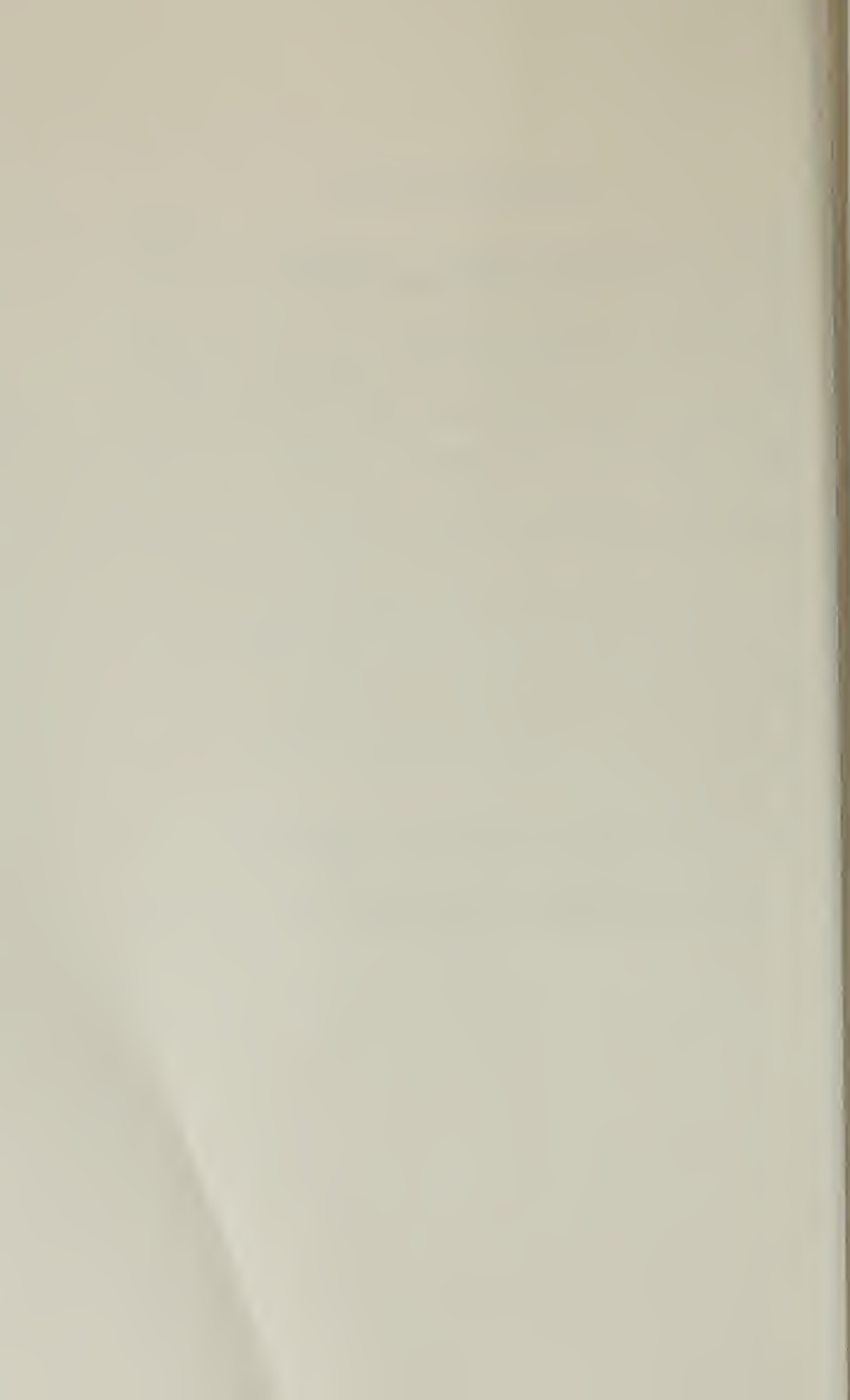

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BRIEF OF APPELLEE

Appellee finds no fault with Appellants' statement of the case, or statement of jurisdiction.

As a matter of convenience, appellee will adopt appellants' method of reference, e.g., the Clerk's Transcript will be referred to as "CT", and the Reporter's Transcript will be referred to as "RT".

Although appellants presented a consolidated brief in all three companion cases, C. J. Montag & Sons, Inc. et al. v. International Brotherhood of Carpenters and Joiners of America, et al., No. 18875, Curtis Construction Co. v. International Brotherhood of Carpenters and Joiners of America, et al., No. 18877, and the instant case, there will be separate Reply Briefs. This appellee, however, adopts those portions of the Reply Briefs of the companion cases of Montag, No. 18875 and Curtis, No. 18877, insofar as pertains to issues of liability, including that of agency, in the interest of avoiding duplication and repetition in the briefs.

DAMAGES

Once the fact of damages is established, the requirement of certainty in proof of the amount of damages is not as strict in this type of case as it might otherwise be in a tort or breach of contract action.

In action for damages under the Labor-Management Relations Act, 1947, federal courts have adopted the rule of *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 51 S. Ct. 248 (1931).

This rule was quoted and applied by the court in *United Mine Workers of America v. Patton,* 211 F. 2d 742, 749 (4th Cir. 1954), as follows:

> "Where the tort itself is of such nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case,

> while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Several other courts, including the Court of Appeals for the Ninth Circuit have followed the rule in cases similar to the instant case. *Flame Coal Co. v. United Mine Workers of America,* 303 F. 2d 39 (6th Cir. 1962); *Merritt, Chapman & Scott Corp. v. Guy F. Atchison Co.,* 295 F. 2d 14 (9th Cir. 1961); *Local Union 984, Int. Bro. of Teamsters, Etc. v. Humko Co.,* 287 F. 2d 231, (6th Cir. 1961) cert. den., 366 U.S. 962, 81 S. Ct. 1922 (1961). The Washington Supreme Court applied the rule in a breach of contract action, *Brear v. Klinker Sand & Gravel,* 160 Wash. Dec. 448, 374 P.2d 370 (1962), and again in a nuisance case, *Cunningham v. Town of Tieton,* 160 Wash. Dec. 439, 374 P.2d 375 (1962).

In the instant case, therefore, appellee is not required to prove the amount of damages with absolute certainty. It need only show "the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."

In the words of the trial judge, the appellee was awarded damages of "not less than $10,000.00" (RT 1211, l. 16) In explanation, the trial court stated, "I think

there was a delay for which they were in no way responsible. I think there was some equipment probably kept on the premises longer than would have otherwise have been the case. . ." (RT 1203, l. 10-13)

Is there ample, competent, substantial evidence in the record, worthy of belief, to support the findings of fact by the District Judge? This Court has held consistently that where the facts found are rational and reasonable, the acceptance or rejection of testimony by a trial judge is binding upon the appellant court. The findings of fact by the trial judge will not be set aside unless they are so inherently improbable that they are not worthy of belief.

Fegles Const. Co. v. McLaughlin Const. Co., 9th C.C., 1953, 205 F. 2d 637;

Russell v. Texas Company, 1956-1957, 9th C.C., 238 F. 2d 636;

Distillers Distributing Corp. v. J. C. Millet Co., 9th C.C., 1962-1963, 310 F.2d 162.

SUMMARY OF EVIDENCE OF DAMAGES

The appellee, Holman, had a contract in the amount of $1,454,805.76 (RT 1086, l. 4), which was to be completed in approximately two years (CT 17, l. 24-25; RT 947, l. 21). Construction work on the Project was halted from June 6 to June 22, 1957, and from September 10 to September 26, 1957, and appellee was required to suspend operations during said periods (CT 19, l. 11-16). During that time (RT 1106, l. 1-10) appellee had placed on the job a large amount of working apparatus which it refer-

red to in its Plant Acquisition Schedule, Plaintiff's Exhibit No. 6, and which had an agreed value of $170,498.-43 (RT 1059, l. 5). Appellee also had machinery on the job valued at $141,073.20 (Plaintiff's Exhibit No. 5). One witness testified that the appellee was paying One Thousand Dollars per month rental for each of two cranes on the job (RT 1105, l. 4). The Appellee lost sixteen experienced men from its crews, as shown by the payrolls (Plaintiff's Exhibit No. 4), as a result of the work stoppages. The sum of $3,185.00 was expended in overtime for the job manager alone (Plaintiff's Exhibit No. 6, Schedule 11-D).

There is undisputed testimony showing that, as a result of the work stoppages, steel was lost and damaged on the job (RT 936 l. 19-23); identification marks and tags were lost from fabricated assemblies, necessitating re-identification and re-tag procedures (RT 935, l. 8 — RT 936, l. 18); multiple handling problems were encountered (RT 939, l. 8-13); storage problems were encountered (RT 940, l. 1-12), and appellee was forced to use certain equipment which was not suited to the task involved (RT 939, l. 4-12); steel installation techniques were interrupted and work had to be done out of sequence, which "Took a lot longer to do it. . . . I think it would take four times as long to put it in, at least." (RT 925, l. 8-13; RT 932, l. 18; RT 934, l. 12.)

It appears quite obvious that even the trial judge believed that the sum of $10,000.00 was a niggardly amount

of damages, in light of the terminology he selected, "not less than $10,000.00."

CONCLUSION

The findings of fact and conclusions by the trial Judge are rational and reasonable, and are supported by ample, competent, substantial evidence worthy of belief.

Respectfully submitted,
WM. R. MORSE
Attorney for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WM. R. MORSE
Attorney for Appellee